

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1327

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

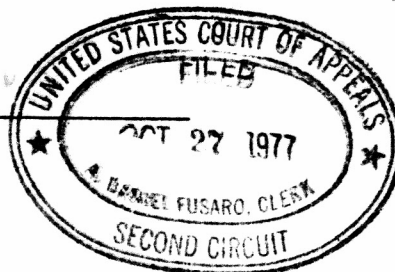
-VS-

WILLIAM COOPER,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Eastern District Of New York*

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77-1327

WILLIAM COOPER,

Appellant.
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BRIEF FOR APPELLANT WILLIAM COOPER

William Cooper appeals from his conviction of July 15, 1977 in the United States District Court for the Eastern District of New York (Mishler, J.), on a jury verdict of violating 18 U.S.C. 2314 (interstate transportation, with unlawful and fraudulent intent, of falsely made or forged security), based on his deposit of two checks which he allegedly knew to be falsely made. The conviction was on two counts, one for each of the checks. The district court sentenced Cooper to three years concurrently on each count. He remains on bail pending appeal.

The case was here this past Spring when Cooper sought mandamus to prevent Judge Platt from commencing trial on May 9. Cooper, sixty seven years old, had massive surgery some years ago. The residue of that, plus numerous other

complications and medical problems, had left him in constant pain, and between the pain and medication he had to take for it, his ability to function mentally and physically and therefore his capacity to defend himself, had been substantially impaired. This Court denied the petition without expressing reasons but it is fair to say because of reluctance to use an extraordinary writ to decide an issue of that nature available on appeal from the conviction. The case was then re-assigned to and tried before Judge Mishler.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in failing to give an instruction to the jury on the limited purpose of the Government's similar act proof? That proof was a major part of the Government's case, yet such instruction was given neither when that proof was introduced nor in the charge at the close of the case.

2. Whether the district court erred in compelling Cooper to stand trial in May? The basis of that ruling, a general practitioner's opinion in March that Cooper's only medical problem was an ulcer -- an opinion opposed not only by Cooper's specialist but the Government's as well -- was conclusively shown to be without foundation when Cooper's pain did not respond to ulcer treatment.

3. Whether the district court erred in admitting computerized bank statements when the Government, in its foundation proof, failed to demonstrate that the computer was operating?

STATEMENT OF THE CASE

The offenses charged date to October 1973. Cooper owned a Long Island company, Franklin Liquidator Corp. Its exact business is not shown but it is not contested that it was a legitimate, active operation, with a warehouse and merchandise (1.43, 1.49).*

Cooper maintained Franklin's business account at the South Melville Branch of Long Island Trust Company. The account had been there since 1971 (1.68), and Cooper was regularly in the bank making deposits and conducting usual banking business (1.64, 1.69). The bank manager considered the account a normal one with no prior bad experiences (1.69-71, 1.77).

Cooper's problems started in August, 1973 when several checks deposited in the Franklin account bounced (1.64). There were sufficient collected funds to cover checks being written on the account and it was not overdrawn (1.47). In September and October, however, there were additional bad deposits, and this time the bank paid out on Franklin's checks written on those

* Numbered references, without more, are to the trial transcript, following the strange procedure of the court reporters of renumbering from one the pages of each day's proceeding, but prefacing the number with the day of the trial, hence 1.43. "A" denotes the Appendix to this Brief, Gx, the Government's exhibits.

deposits, typically because the bad deposit check was not returned until after the bank's four day hold between the date of the deposit and the date it gave Franklin credit in the account for the deposit (1.44, 45; 1.56). Although there were sufficient collected funds at the beginning to maintain the credit balance in the account, by October it was short some \$19,000 (1.95). Cooper and the Long Island Trust then entered into an agreement treating the overdraft as a loan (2.17), with Franklin pledging its merchandise as collateral (1.48-49).

Indictment and Trial

The Government's later indictment of Cooper under 18 U.S.C. 2314 (A 5) contained three counts, each based on a separate October check payable to Franklin which had been deposited in Long Island Trust and then returned: Count One, a check for \$12,465 drawn on City National Bank, Detroit, Michigan (A 5); Count Two, \$15,650 drawn on First National Bank, Milwaukee, Wisconsin (A 5); and Count Three, \$15,375 drawn on First National Bank, Chicago, Illinois (A 5). In each case the check had bounced because the account was "unknown" to the drawee bank.

Over Cooper's protests, for reasons we spell out fully in Point II of the Argument, renewed again before the trial court after the mandamus petition was denied (1.4),

trial was held this past May. The Government immediately moved to sever count one, fearful it might not be able to prove an offense as to it (1.4). It went to the jury on the other two counts, urging that Cooper himself had prepared the Chicago and Milwaukee checks on blank forms with false payor names. As direct proof of that, it had one of the bank managers testify that the blank check forms could be purchased in any stationary store (1.105, 2.49); had employees from the Chicago and Milwaukee banks verify that the payor's signature was illegible, that the account numbers were not in accord with the bank's practice and that no such accounts existed at their banks (2.56, 2.58, 2.64-66); and had an FBI expert state that the endorsement on the Milwaukee check was Cooper's (2.80-81). In addition, one of the managers testified that he had discussed a "kite" with Cooper, and Cooper had advised him not to worry, everything would be taken care of (1.56-58).

By far the greater part of the Government's case on Cooper's fraudulent state of mind, however, was pattern evidence: that the Chicago and Milwaukee checks had been preceded by eight others -- including the Detroit check, now no longer a formal charge but still part of the Government's case -- in which banks outside the City had returned checks for "unknown accounts", illegible signatures and so forth. And to prove this pattern the Government placed before the jury:

(A) Those eight checks themselves so that the jury could see the similarities between them and the Chicago and Milwaukee checks, including the use of blank forms from stationary stores, the typewriter, the illegible signatures, and in a few cases the "account unknown" stamps from the out of city bank. Gx 12 (Bank America, Los Angeles); Gx 14 (Continental Illinois, Chicago); Gx 16 (Continental Illinois, Chicago); Gx 18 (Bank America, Los Angeles); Gx 20 (National Bank of Detroit); Gx 22 (Bank America, Los Angeles); Gx 24 (National Bank of Detroit); Gx 25 (City National Bank, Detroit);

(B) Deposit tickets on those eight checks (Gx 10, 13, 15, 17, 19, 21, 23, 26);

(C) Bank statements reflecting the fact that they had bounced (Gx 3; Tr. 2.4-5);

(D) Bank manager testimony to the same effect (e.g. 1.29-31; Detroit check with illegible signature; verification from Detroit bank that "no account in that name"; 1.64-65, 1.77: checks "returned for either signature illegible or could not locate the account"); and

(E) The FBI expert's opinion that the Detroit check and the Wisconsin check had been typed with the same typewriter (2.83-84).*

The Assistant stressed this alleged pattern to the jury both in his opening and in his closing statements, with particular

* The Government attempted to lay a foundation for the computerized statements by having the bank manager testify they were made in the regular course of business. It was never shown, however, that the computer was working, an omission which forms the basis of Point III of our argument.

emphasis on the Detroit check (A 34-38, 32).^{*} His requests to charge specifically asked for a similar act jury instruction (A 44-45). The Court agreed that "the Government ha[d] introduced the prior similar acts", and that such a charge had to be given (A 45). It discussed the language with

^{*} His opening was as follow:

"But the evidence will also show that during the course of the summer and into September 1973, a number of checks were deposited into this account. The checks bear similarities each to the other. Basically the checks are counterchecks. They all have the same facial appearance. They don't have the microcoding that appears on a personalized check. It's a countercheck, legible signatures on all these checks. There will be about ten that the Government will offer into evidence, drawn on out-of-state banks rather than in-state banks.

* * *

"Finally, in October of 1973, three checks were deposited, first of all a check in the amount of roughly \$15,000 is deposited. It's drawn on the City National Bank of Detroit, Michigan. It's this countercheck. It has no bank account number on it. The check comes back bounced.

* * *

"And the evidence will show that there are two other checks, and these two checks form the basis of this indictment.

"After that City National Bank Detroit check went through, there was very little left in the bank account. The next two checks, first of all, a check drawn on the First Wisconsin National Bank; and the second check drawn on the First National Bank of Chicago, Illinois, were counterchecks, legible signatures, and the bank numbers were not microcoded; they were typed in.

"Those checks bounced. And the account is then brought to a state of overdraft, overdraft, of \$19,000. Those form the basis of the charges herein."
(Tr. 1.19-21)

counsel (A 46-47). However, its final charge omitted any mention of similar acts or the Rule 404(b) limitations.

The jury deliberated some six hours on the two counts, asked a question of the court which showed some doubt on what it might consider as bearing on fraudulent intent (A 27) (doubt the court's supplemental charge did not clear up), and ultimately returned a guilty verdict on both counts.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY FAILING TO CHARGE THE JURY ON THE LIMITATIONS OF THE GOVERNMENT'S PATTERN EVIDENCE.

The pattern of bounced checks was well within the scope of proof allowed the Government, and we have no fault with the district court for admitting it all on the intent issue. F.R. Evid. 404 (b). United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975). The Government, however, properly requested a limiting instruction to prevent the jury from concluding from the similar acts that Cooper's character was bad and then using that bad character to move to a finding that he fraudulently passed the Milwaukee and Chicago checks. The district court agreed such an instruction had to be given. This circuit's decisions clearly compelled it, not only, we submit, at the close of the case but at the time the similar act testimony was admitted. United States v. Papadakis, 510 F.2d at 295; United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965); United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975).

In the end, however, no such charge was given. This requires a new trial. It matters not for reversal that defense counsel forgot to ask again for the limiting instruction at the conclusion of the charge. The government had asked for it and the district court had said he would give it (A 44-45), thus buttressing application of the plain error rule, F.R. Crim. P. 52(b), which should govern here in any event when something so

fundamental is involved. The error was anything but harmless. Much of the Government's case was the pattern evidence (pp. 5-6 supra) and as we have shown the Assistant saw that its impact was clearly impressed on the jury. Cf United States v. Moss, 2d Cir. Sept. 6, 1977 (no waiver of right to preclude Government from using Bankruptcy Act immunized testimony although counsel failed to object).

POINT II

THE DISTRICT COURT ERRED IN ORDERING COOPER TO PROCEED TO TRIAL IN MAY. THE ALSOP OPINION, ON WHICH THAT ORDER WAS BASED, WAS WITHOUT MEDICAL FOUNDATION.

We address now the medical issue -- a serious one because if we are right, Cooper was compelled to participate in a trial when he lacked the appropriate physical and mental capacity to defend himself. We set forth first in some detail the factual background for the district court rulings under review. The nub of the question, as this Court will see, is that Judge Platt ordered an immediate trial because a general practitioner of his prior acquaintance, appointed to examine Cooper, thought the medical problem was only an ulcer that could be sufficiently handled with conventional ulcer treatment. This diagnosis was plainly wrong. Not only did Cooper's condition not respond to the ulcer treatment but the testimony and reports of the numerous specialists in the case, including the Government's neurologist, conclusively showed that the condition was traceable to Cooper's earlier extensive surgery and the organic dislocation and massive pain which followed and that these problems were being handled only through large amounts of mind dulling drugs, mainly morphine.

Marks and Chernik Reports

The indictment in this case was filed in April 1974. Through that year and 1975 there were various communications with the court about Cooper's ability, physically, to stand trial. The highlights of the problem are found in two medical reports, one from Cooper's neurologist, the other from the Government's.

The first, dated November 7, 1974 (A 48) from Dr. Chernik, Cooper's neurologist at the Sloan-Kettering Cancer Center, stated: In May 1969 Cooper had combined thoracic and abdominal surgery to repair a "massive diaphragmatic herniation of the colon into the chest cavity", complicated by problems in the left lung. Immediately after the surgery Cooper had severe chest pains, requiring a second operation in November 1969 to stabilize the chest wall and remove peripheral nerves from affected ribs. A cerebrovascular accident further complicated the operation and left Cooper with left side weakness (A 49). Chest pain in the area of the surgical incision continued unabated with no response to attempted cures (A 49). In addition Cooper suffered from recurrent polyps of the large bowels and persistent blood tinged sputum.

The second report, dated May 13, 1976 (A 50) was from Dr. Morton Marks, another neurologist who examined Cooper on behalf of the Government. He noted, as did Chernik, the marked tenderness in the area of the surgical incision, the severe pain arising therefrom, the left-sided weakness, the coughing up of blood, the recurrent bowel problems and several other symptoms. He viewed Cooper's medical problems as "extremely serious", stated that the physical and emotional strain of a trial "would aggravate and accentuate the pain and discomfort", and recommended that Cooper "not stand trial at this time" (A 51).

The September 24 Hearing

In September 1976 Judge Platt heard testimony from Drs. Chernik and Marks in order principally to ascertain whether there was substance to the Government's suspicion that Cooper might be feigning pain. Dr. Chernik, however,

demonstrated that structural alterations from the surgery produced Cooper's pain and that there had been numerous unsuccessful attempts to remedy it, including acupuncture (A 52-4). The severe pain required large quantities of drugs (some every two hours) (A 64) and these drugs clouded his mind, made him lethargic, and took away his ability to function properly in his own defense (A 53-5).^{*} Dr. Marks, who by then had examined Cooper twice for the Government (A 60), agreed with the Chernik analysis (A 60-62), agreed that the drugs would significantly interfere with his ability to participate in the trial (A 67-68), and agreed with Chernik's recommendation that Cooper not stand trial at that time (A 62-66). The district court stated, however, that he was "not convinced one way or the other" (A 69) and that he might commit Cooper to a hospital "for a sustained period of time" for a thorough examination and from it the benefit of a third opinion (A 69-70).

The Alsop Opinion; the March Hearing

That procedure was not followed. The district court did indeed solicit a third opinion (A 71) but it did not come from a hospital, it did not follow sustained observation, and it did not follow a thorough examination. And although the principal subject was whether Cooper's pain following his operation was real (A 72), the doctor to whom the court turned,

^{*} The principal drug was morphine.

Reese Alsop, was not a neurologist with that specialty, but an internist, whom Judge Platt had known previously.

Dr. Alsop's opinion that Cooper could stand trial "with good medical management" is reflected in his March 7, 1977 report (A 73) and was repeated at a further hearing the district court held on March 23, 1977. He acknowledged Cooper's extensive surgery and the tenderness therefrom and the "real possibility" that this was the cause of Cooper's pain (A 75). He observed also borderline hypertension, coronary artery disease, and multiple polyposis (A 75). What intrigued him most, however, was the possibility that Cooper had three large, active duodenal ulcers. These, he believed, might be the cause of the pain, and he thought it "interesting to see what careful ulcer management could achieve" (A 75).

Cross-examination of Dr. Alsop at the March hearing brought out the following:

(a) That if Cooper had had intractable pain for five years, ulcers could not be the cause (A 80). Alsop doubted such pain, however, without any backing whatever for that view except his belief that patient's memories are fallible (A 81).

(b) That the ulcer diagnosis was inconsistent with the textbook authorities on ulcers (A 82).

(c) That the ulcer diagnosis was inconsistent with another X-Ray series taken two weeks after the Alsop examination. Alsop explained the contrary results on the basis that the ulcer may have "healed" in that length of time (A 82) if Cooper had followed Alsop's regimen of "antacids and stay away from tea, coffee, alcohol and spices, and frequent small feedings" (A 82-83).

(d) That the ulcer diagnosis was inconsistent with the fact that Cooper had previously had certain nerves removed. See also A 74.

(e) That the ulcer diagnosis was inconsistent with the fact that Cooper had a hernia operation some years earlier at which time there was no ulcer.

(f) That Alsop had made a mistake when he said in his report that Cooper's brother was alive. That brother in fact died of myocardial infarction. Alsop made another mistake in saying that Cooper had a colonoscopic examination in February 1977. The examination was cancelled because of Cooper's heart problem.

Alsop made three further significant concessions. First, he admitted that Drs. Marks and Chernik might be right about the cause of the pain and he wrong. Indeed the only point in the whole business about the ulcers was that one

ought to try to clear up the ulcers (or what Alsop thought were ulcers) and see what happened (A 90). This, he estimated, might take six weeks.

Second, he stated that there was a 90% chance that Cooper had coronary artery disease (A 87) so that a trial would threaten his life.

Finally, he stated that in view of the level of medication Cooper was taking (A 80-81) "it's fair to say that he would have trouble with his defense" (A 82). See also A 76-78.

At the conclusion of the hearing the Court suggested that Cooper follow Alsop's prescription for treating the ulcer and then be re-examined. That re-examination took place on April 18 (A 91). The pain remained unabated (A 92) which effectively eliminated Alsop's ulcer diagnosis. Alsop, however, continued to adhere to that diagnosis.*

The April 29 Hearing

The parties returned to court on April 29. The district court refused Cooper's request for further testimony to demonstrate that Alsop's analysis could not be right. It stated instead, that it had "great confidence" in Alsop, had selected him to obtain an independent view, and that no

* In addition to the fact that Alsop's treatment did not work and to Chernik (A 98) and Marks, the opinions of at least three other highly qualified doctors (e.g. A 94, 96, 101) showed that Alsop could not possibly be right in attributing the chest pains to an ulcer. The district court, however, refused to hold the hearing open for their testimony.

objection had been raised to his choice. Referring to Alsop's testimony and findings that Cooper had sufficient ability to consult with his attorney with a reasonable degree of rational understanding and understand the proceedings (and noting incidentally its own observation at the March 23 hearing that Cooper had assisted his counsel), the Court denied defendant's application to stay the trial and fixed May 9 as the date for it to commence (A 30-31).

The Error Below

A defendant may not be compelled to stand trial when he is unable to understand the proceedings or "properly to assist in his own defense", 18 U.S.C. 4244. Pate v. Robinson, 383 U.S. 375 (1960); Drope v. Missouri, 420 U.S. 162 (1975). The cause of the impairment may be insanity or mental derangement, as specifically set forth in Sec. 4244, but as here, it can be extreme pain, mind-dulling drugs, or a combination of both. United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971); United States v. Knohl, 379 F.2d 429, 436 (2d Cir. 1967); United States v. Valentino, 283 F.2d 634, 635 (2d Cir. 1960). The burden is the Government's to demonstrate that the trial will not infringe the right. United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1973). In this case the district court plainly erred in finding that the Government met it.*

* There were no modifications of normal trial procedure, e.g., shorter hours or longer breaks, to assist Cooper in handling the trial situation.

First, with respect to the pain itself, the Government failed to show that it was not real--a position which had motivated its opposition to the stay in the first place (A 72). On the contrary its own expert, Dr. Marks, confirmed that Cooper was not feigning, as did Dr. Alsop at the time of his examinations (A 77).

Second, the record did not possibly admit to a finding that the cause of the pain was an ulcer, and no amount of the court's prior confidence in Dr. Alsop could justify acceptance of that view. It was not only the considered opinion of the several neurologists who testified or were prepared to testify for Cooper, nor the significant inconsistencies in Alsop's diagnosis, even to the point of suggestion that the ulcers had healed in two weeks. It was the uncontroverted fact that although Alsop's "regimen" had been followed, the chest pain had not subsided. And it was the further element, which neither the Government nor the

court could avoid, that the Government's own expert, certainly not "partisan" to Cooper (A 30) stated unequivocally that the pain resulted from the 1969 surgery, not from an ulcer.

Third, even if Alsop opposed the other experts on the fact that ulcers caused the pain, and that it would disappear with a mild diet (which of course did not turn out to be the case), he very much agreed with them that as long as Cooper took pain killing drugs, his ability to assist in his defense would be significantly impaired. He insisted, moreover, that until the alleged ulcer was cured trial was not appropriate, and indeed the foundation for the court's further delay at the March 23 hearing and the order for Alsop's re-examination six weeks later was that in the interim, while the pain persisted, no trial could be had. But the new examination changed nothing except to show the error in Alsop's diagnosis. The ulcer regimen was tried. The pain did not go away.

The district court, therefore, was clearly wrong in disregarding Cooper's severe pain and its effect, disregarding the massive medication and its effect, disregarding the neurological experts of both sides, and basing its opinion, as it did, on Alsop's views which rested on one mistake after another. As to the court's observations of Cooper's demeanor at the March 23 hearing, that carries little weight. In the first place it was the Alsop opinion

not those observations upon which the district court rested its denial of the stay. Beyond that, however, the brief observations of a lay court, and that included Judge Mishler's latter similar views as well (2.74-76), could not prevail over the unanimous testimony of all of the experts, including the Government's and the court's, that the level of medication would effect Cooper's ability to assist his counsel over the course of the trial. Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) (Court's observations of defendant's seeming rationality at guilty plea not conclusive); Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974) (same); Pate v. Robinson, supra; Drope v. Missouri, supra.

We close with this observation. Judge Platt unquestionably had the power to appoint Alsop to render an opinion. F.R. Evid. 706. For all intents and purposes, however, that appointment, once made, settled the issue. There was little chance the court would reject the opinion of its own expert, especially a doctor with whom the judge was friends,*

* See remarks of Professor Moore at the 1973 Congressional hearings on the proposed evidentiary rules, quoted in Weinstein, Evidence, 706-4:

"I think what is worrying you and Mr. Schaeffer is that as soon as he is announced as the court's expert, then all other expert testimony by the parties disagreeing with it might as well not have been presented.

"I think that in the end fact, you are not really presenting him as an advocate's witness. You are here presenting him as truth, clothed with the sanctity of judicial authority. I think it is a dangerous concept, because there are no such things as unbiased human beings. There, therefore, are no unbiased experts."

even if that opinion was contrary to the Government's expert. Indeed dissatisfaction with Dr. Marks, who incidentally, is an eminent neurologist, was probably why Judge Platt appointed Alsop in the first place.

We think Judge Platt should have chosen an independent expert from a panel of doctors selected by all the Eastern District judges, not a personal friend. Weinstein, Evidence, 706-5. What makes the matter much worse, however, is the friend's lack of qualifications. He was a general practitioner now asked to deal with complicated neurological problems. And while some general practitioners could have applied good common sense to reduce those problems to simple layman's terms, Alsop's reduction to an ulcer bordered on the absurd.

POINT III

THE COURT SHOULD HAVE EXCLUDED ALL EVIDENCE PRODUCED BY A COMPUTER, e.g., A PRINTOUT, BECAUSE NO FOUNDATION WAS HAD AS TO THE PROBITY OF THE SAID PRINTOUT.

The Government put in evidence a "printout" from a computer (Government's Exhibit 3, A 39, A 41). Objection was taken. To resolve the issue the Court directed a preliminary examination of the witness by counsel for the appellant (A 40-42).

Upon being examined the witness admitted that the computer was programmed by somebody else (A 40). The witness did not know who programmed the computer (A 40-41).

The Court ruled that the exhibit was admissible as entries made "routinely" in the regular course of business (A 41-42).

After the printout was admitted, the prosecutor read portions of it to the jury.

As the case progressed, the witness was further questioned by government counsel and the witness stated or admitted:

"In reviewing the statements there are overdrafts listed and uncollected funds listed. Our computer is out of line as to frequency and are sometimes out of line. They don't have to answer to senior management so that's why they are occurring in a high frequency manner." (A 43)

It would be fair to state that the Court ruled that Rule 803(6) of the Federal Rules of Evidence was the standard.

This rule states in its relevant part that:

"Records of Regularly Conducted Activity.-
A memorandum, report, record or data compilation, in any form, of acts, events, conditions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of . . . qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . ."

Firstly, under that rule no foundation was had in this case because all the witness was asked by the Government attorney was whether:

"Q. So these bank statements are prepared in a regular course of the company's business; is that correct?

A. Yes.

Q. And they are kept in the regular course of your company's business?

A. A copy is kept for one year and then they are microfilmed again and then these sheets are destroyed.

Q. Now I will withdraw that question." (A 39)

However the Government did not establish the other element of Rule 803(6) namely whether it was the regular practice of that business activity to make the memorandum and the like.

Secondly, in view of the admission of the doubtful reliability of the automated process, the basis for the application of this rule of evidence was attenuated. As stated in 4 Weinstein's Evidence at pages 803-143 - 803-144:

"The shop-book rule and, at first, the regular entries rule assumed that only the records of commercial establishments satisfied the trustworthiness requirement for exceptions to the hearsay rule. Guarantees of reliability were said to be furnished because (1) such records are customarily checked as to correctness by systematic balance striking, (2) the regularity and continuity of such records produce habits of precision in the record keeper, (3) business functions in reliance on such records, and (4) employees are required to make accurate records as part of their job and risk embarrassment and censure if they blunder."

However, it is suggested that Rule 803(6) of the Federal Rules of Evidence is not the sole basis for the admission of this type of evidence assuming it can be a basis at all. For Rule 901(a) provides in part that:

"General Provision. The requirement or authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

"(b) Illustrations. By way of illustration only and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (9) Process or system. Evidence describing a process or system used to produce a result in showing that the process or system produces an accurate result."

For an exposition of how computers operate, and how the products of computers can become items of evidence see Weinstein's Evidence at page 1001-99, et seq. At page 1001-100, the operation of a computer is set forth. Then on page 1001-100, the text recites that:

" . . . the original data may be inaccurate, the machine may not have been working properly or had been used so that errors were introduced, the program may have been inadequate, the data or the program may have been tampered with and the printout may not be complete. Among the difficulties posed are the fact that (1) no one could directly describe what he observed happening; (2) there are no records of notices being sent and other things being done; (3) there are no records kept in discrete categories; the categories are created as required; (4) originals are erased and re-combined so that the original records may be eliminated. . . ."

However, there was not one iota of proof in this case establishing a foundation for the probity or authenticity of the Government's exhibit. See United States v. Russo, 480 F.2d 1228, (Cir. 6th, 1973) where this issue was fully explored. In that case, the Government brought in the experts who operated the computers or knew how the computers worked. The Government's proof consisted of demonstrations of methods used to guarantee accuracy and avoid error. This was held to be, among other things, a proper foundation for the introduction of computerized data as evidence.

CONCLUSION

The judgment below should be reversed and the case remanded to the district court to reconsider whether it is appropriate for Cooper to stand trial at this time, and barring that a new trial in view of the trial errors set forth in Points I and III.

Respectfully submitted,

ARNOLD WALLACH, Esq.
Attorney for Appellant

Arnold Wallach, Esq.
Donald E. Nawi, Esq.

Of Counsel

WALLACH

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 27 day of Oct. 1977 deponent served the within BRIEF upon

U.S. Atty. Est. Dist. of NY and
Sara Criscitelli,

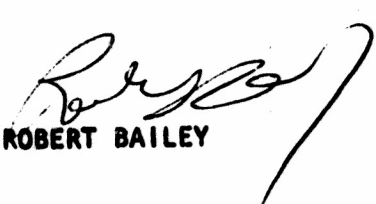
attorney(s) for

Appellee

In this action, at

225 Cadman Plaza East, Brooklyn, NY and
c/o George Gilinsky, Box 899, Ben Franklin Station, Washington, D.C. 20044

the address(es) designated by said attorney(s) for that purpose by depositing
_____ ³ copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 27 day
of Oct. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976

